STATE OF MICHIGAN

IN THE SUPREME COURT

LANZO CONSTRUCTION COMPANY,	Docket No.
Plaintiff-Appellant,	
v	Court of Appeals No. 264165
WAYNE STEEL ERECTORS, a ~~Michigan Corporation~~,	Wayne County Circuit Court No. 04-408824 CK
Defendant-Appellee.	

PLAINTIFF LANZO CONSTRUCTION COMPANY'S APPLICATION FOR LEAVE TO APPEAL

NOREEN L. SLANK (P31964)
Attorneys for Plaintiff-Appellant
4000 Town Center, Suite 909
Southfield, Michigan 48075
(248) 355-4141

MICHAEL F. SCHMIDT (P25213)
Attorney for Defendant-Appellee
1050 Wilshire Drive, Suite 320
Troy, MI 48084-1526
(248) 649-7800

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

TABLE OF CONTENTS

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

INDEX OF EXHIBITS

INDEX OF AUTHORITIES

Cases

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Statutes

Rules

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT OF JURISDICTION

Plaintiff Lanzo Construction Company seeks leave to appeal the Michigan Court of Appeals' January 26, 2006 opinion (together with its March 16, 2006 order denying reconsideration of that opinion) that affirmed Wayne County Circuit Court Judge Gershwin A. Drain's June 6, 2005 order granting defendant Wayne Steel Erectors' motion for summary disposition and denying plaintiff Lanzo Construction Company's motion for summary disposition. See Court of Appeals' Opinion (***Exhibit A***), Court of Appeals' reconsideration order (***Exhibit B***), and Order granting summary disposition (***Exhibit C***).

This Court has jurisdiction under MCR 7.301(A)(2), which permits "review by appeal . . . after decision by the Court of Appeals," and under MCR 7.302(B)(3) and (5), which provide for appeals to this Court from Court of Appeals' decisions when the issues involve legal principles of significance to the state's jurisprudence or when an opinion is clearly erroneous and will cause material injustice.

This Application for Leave to Appeal is timely filed, within 42 days of entry of the March 16, 2006 Court of Appeals' order denying plaintiff's timely-filed Motion for Reconsideration as to the January 26, 2006 opinion. MCR 7.302(C)(2)(c).

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT OF QUESTIONS PRESENTED

I. Indemnity: Wayne Steel's motion and sole negligence

Wayne Steel's employee (Agueros) stumbled when he miscalculated his route through the construction site and struck a support while carrying re-bar. He admitted negligence when his settlement was placed on the record. Wayne Steel's foreman was advised of the risk Agueros primarily blamed for his trip and fall, but he told Agueros to keep working. The Lanzo/Wayne Steel indemnity contract shifts all liability for Agueros' injury from Lanzo to Wayne Steel except if Lanzo is the solely negligent party. See MCL 691.991 . Do Lanzo's proofs (at a minimum) create an issue of fact on the existence of also-negligent parties?

The trial court answered the question "No" and granted summary disposition against Lanzo Construction Company and in favor of Wayne Steel Erectors holding, as a matter of law, that Lanzo was the solely negligent party.

The Court of Appeals answered the question "No" and affirmed the trial court.

Defendant/Appellee Wayne Steel Erectors contends that the answer is, "No."

Plaintiff/Appellant Lanzo Construction Company submits that the correct answer is, "Yes." At a minimum, the proofs raise a material issue of fact (for the jury to decide) about whether Agueros or his employer (Wayne Steel Erectors) was negligent, so as to defeat Wayne Steel's claim that Lanzo is the solely negligent party.

II. Indemnity: Lanzo's summary disposition entitlement

An indemnitor [Wayne Steel], with notice of a lawsuit, refused to defend. The case settled. The indemnitee [Lanzo] only needs to show its "potential" rather than "actual" liability and plenary trial of underlying liability issues is not allowed. *Grand Trunk Western Railroad v Auto Warehousing*, 262 Mich App 345 (2004). The injured plaintiff admitted his comparative fault when the settlement was placed on the record, consistent with his deposition testimony. Was the indemnitee [Lanzo] entitled to summary disposition because Lanzo was not a solely negligent party?

The trial court answered the question "No." It granted Wayne Steel Erectors' summary disposition motion and denied Lanzo Construction Company's summary disposition motion.

The Court of Appeals answered the question "No" and affirmed the trial court.

Defendant/Appellee Wayne Steel Erectors will contend that the answer is, "No."

Plaintiff/Appellant Lanzo Construction Company submits that the correct answer is, "Yes."

REASONS WHY LEAVE SHOULD BE GRANTED

A date-confined topic search in Westlaw reveals that, since 1985, the Court of Appeals has released something in the neighborhood of 200 contractual indemnity opinions. Many of the opinions fight with one another about what methodology should be used to decide the cases. Some panels say the clear words of the contract rule unequivocally when it comes to the parties' intent and surrounding circumstances are not to be examined. *Martin v City of East Lansing*, 249 Mich App 288, 291; 642 NW2d 700 (2001). Some unapologetically examine the surrounding circumstances even when the words of the contract are clear. *Paquin v Harnischfeger*, 113 Mich App 43, 53; 317 NW2d 279 (1982). Some examine both the words of the contract and the surrounding circumstances, looking for the parties' intent. *Pritts v JI Case*, 108 Mich App 22, 28; 310 NW2d 261 (1975); *Chrysler v Brencal*, 146 Mich App 766, 772; 381 NW2d 814 (1985), *Sherman v DeMaria*, 203 Mich App 593, 598-599; 513 NW2d 187 (1994).

Construction industry indemnity contracts, including the one in this case, bear an extra burden. They must comply with MCL 691.991, which prohibits securing indemnity for an indemnitee's "sole negligence." The Michigan Court of Appeals has increasingly shown, as here, a disregard for an indemnitees' right to have its alleged negligence determined by a jury. The most recent and one of the clearest examples is the present case. The trial court and then the Court of Appeals held—as a matter of law—that a worker who basically knocked himself down by hitting a column with what he was carrying in his arms could not *even potentially* be comparatively at fault. It made this ruling even though, while settling his case, that worker *admitted* his comparative fault. The lower courts have ignored the undisputed physical facts of the accident. The Court of Appeals also engaged in purposeful and completely improper fact-finding by declaring the underlying plaintiff's in-court admission to be irrelevant to the inquiry

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

because somehow the panel decided that "it was motivated by the underlying plaintiff's desire to reach a settlement with plaintiff in that case." (Slip Op, p 4). What should have happened in this case is the result that Ford secured in the recent case of *Papalas v Ford Motor,* unpublished opinion per curiam of the Court of Appeals, issued November 8, 2005 (Docket Nos. 252470, 252527).[1] There the indemnitee secured reversal of summary disposition in favor of the indemnitor because "it was possible that parties other than Ford were comparatively negligent."

Consider, as well, that all these core issues of indemnity contract and statutory interpretation are embedded in a case that also gives this Court an opportunity to address the burdens of proof (with respect to absence of sole negligence and otherwise) when an indemnitee puts an indemnitor on notice of a claim and of a pending settlement and invites the indemnitor to participate in that settlement. See e.g. *Grand Trunk Western RR v Auto Warehousing Co*, 262 Mich App 345; 686 NW2d 756 (2004) leave to appeal denied after oral argument 474 Mich 915; 705 NW2d 353 (2005) (Justices Corrigan and Markman would have reversed in part, adopting Judge Wilder's dissent).

All of this confusion within indemnity law makes it impossible for businesses in Michigan to have any clear sense of whether or not indemnity is owed for bodily injury and property damage claims. In such an environment, the insurers who provide the state's businesses with comprehensive general liability coverage, which almost always includes "insured contract" coverage that applies to an insureds' indemnity liability, have no way of predicting or assessing the litigation risk to their insureds.

This case gives the Court an opportunity to establish rules for interpreting and applying indemnity contracts in a way that would bring order to this chaos of disparate case law,

[1] ***Exhibit D***, *Papalas v Ford Motor*. Third party defendant Metro Industrial Painting's Application for leave to appeal is presently pending before this Court.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

including in the context of a construction industry indemnity agreement that raises issues of sole negligence under MCL 691.991. This Court has not written an express contractual indemnity opinion since its one paragraph opinion/order in *VandenBosch v Consumers Power*, 394 Mich 428; 230 NW2d 271 (1975).[2] *VandenBosch* was also the first, and last, time that this Court ever considered the effect of MCL 691.991. If this Court will see fit to grant leave to allow the appeal to go forward, this case has much to teach the bench and bar. At a minimum, a peremptory reversal of that aspect of the Court of Appeals opinion that granted Wayne Steel's motion is called for. There is *no way* that Lanzo Construction failed to at least raise an issue of fact about Mr. Agueros' potential comparative fault (or Wayne Steel's own fault).

What the author of "Michigan's Murky Law of Contractual Indemnity" wrote in the Michigan Bar Journal in 1996 is truer today than it was ten years ago:

> In light of appellate court decisions construing the application of MCLA 691.991 in wildly divergent decisions, attorneys can only hope that the Michigan Supreme Court will soon accept an indemnity contract case that will provide definitive guidance. Absent such resolution, many cases involving interpretation of indemnity contracts will result in protracted litigation involving substantial and unnecessary litigation expenses to all parties.[3]

---

[2] Since *VandenBosch*, this Court faced *implied* contractual indemnity in *Williams v Litton Systems*, 433 Mich 755; 449 NW2d 669 (1989), common law indemnity in *St. Luke's Hospital v Giertz*, 458 Mich 448; 581 NW2d 665 (1998) and choice of law issues in the express contractual indemnity context in *Chrysler Corp v Skyline Industries*, 448 Mich 113; 528 NW2d 698 (1995).

[3] Haskell Shelton, "Michigan's Murky Law of Contractual Indemnity," 75 Mi Bar Jnl 1182, 1185 (1996) ***Exhibit E.***

STATEMENT OF FACTS

Introduction and Background

Fernando Agueros, an employee of defendant Wayne Steel Erectors ("Wayne Steel"), was injured when he lost his balance and injured his back at the "Leib Screening and Disinfection Facility" construction site owned by the City of Detroit. Lanzo Construction Company ("Lanzo") was the general contractor. While walking at the site, Agueros struck a column with one end of the re-bar he carried in his arms.[4] This caused him to lose his balance. He tried to fall forward, rather than backward, allegedly because he feared a railing on the third floor where he was working was too weak to support his weight.

The contract between Wayne Steel and Lanzo requires Wayne Steel to indemnify Lanzo for "any and all damages" for lawsuits brought against Lanzo.[5] There is no dispute but that Wayne Steel's indemnity obligation to Lanzo is subject to the bar on indemnity for "sole negligence," as set forth at MCL 691.991.

Agueros sued Lanzo.[6] Lanzo tendered its defense to Wayne Steel.[7] Wayne Steel declined to undertake Lanzo's defense.[8] Wayne Steel was notified of the impending settlement with Agueros, but it refused to participate.[9] Lanzo settled with Agueros. The settlement was placed on the record in open court, with counsel for Wayne Steel in attendance and placing his appearance on the record.[10] This lawsuit ensued. Lanzo seeks to recover the $125,000 it paid

[4] Re-bar is steel rod, with ridges, used to reinforce concrete.
[5] See ***Exhibit F***, p 4 of 12.
[6] ***Exhibit G***, Agueros Complaint.
[7] ***Exhibit H,*** First Amended Complaint, ¶13 and ***Exhibit I,*** 3/17/04 letter from Eppens to Wayne Steel.
[8] ***Exhibit H,*** First Amended Complaint, ¶14, ***Exhibit J***, Wayne Steel's Answer to First Amended Complaint, ¶14, admitting its counsel was present at the settlement conference in the Agueros' case and that it refused to contribute to the Agueros settlement.
[9] *Id.*
[10] ***Exhibit K***, Hearing Transcript 7/29/04, p 6-7.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

in settlement to Agueros together with its defense costs.[11] Wayne County Circuit Court Judge Gershwin A. Drain granted summary disposition in favor of Wayne Steel and against Lanzo, with cross motions for summary disposition pending. Lanzo appealed as of right to the Court of Appeals. The Court of Appeals affirmed Judge Drain. Lanzo's Application for Leave to Appeal to this Court follows timely, as reckoned from its timely-filed Motion for Reconsideration (which was denied).

The contract between Lanzo and Wayne Steel

The twelve page agreement between Lanzo and Wayne Steel was signed by Wayne Steel on December 29, 1999. Lanzo is the "contractor" and Wayne Steel is the "subcontractor."[12] Within the contract's "Insurance" term, Wayne Steel agreed to be liable for "any and all damage or injury" "growing out of" "the performance of the work" of the subcontract:

> The Subcontractor assumes responsibility for, and liability in and for, any and all damage or injury of any kind or nature whatever to all persons and to all property growing out of or resulting in the performance of the work set forth in this subcontract..."[13]

In addition to stating that Wayne Steel would assume liability for all personal injury damages "growing out of" the performance of the work in the insurance section of the contract, Wayne Steel backed up that promise by agreeing to indemnify and hold Lanzo harmless for "any and all" such claims. The indemnity contract uses a lot of words, which Wayne Steel has consistently criticized, but it makes its meaning clear (as the Court of Appeals held):

> The Subcontractor [Wayne Steel] hereby assumes entire responsibility and liability ***for any and all damage or injury of any kind*** *or nature whatever* (including death resulting therefrom) be made or asserted, whether or not such claims are based upon Lanzo alleged active or passive negligence or participation in the wrong

[11] ***Exhibit H***, First Amended Complaint, ¶15, and "wherefore" clause following ¶18.
[12] ***Exhibit F***, p 11 of 12.
[13] ***Exhibit F***, ¶8, p 4 of 12.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

> or upon any alleged breach of any statutory duty or obligation on the part of Lanzo, *the Subcontractor* ***agrees to indemnify and save harmless*** *Lanzo*, its officers, agents, and employees *from and against* ***any and all claims***, and further from and against any and all loss, cost, expense, liability, damage or injury, including legal fees and disbursements, *that Lanzo*, its officers, agents, or employees *may directly or indirectly sustain, suffer or incur as a result* thereof and the Subcontractor agrees to and does hereby assume, on behalf of Lanzo, its officers, agents or employees, the defense of any action at law or in equity which may be brought against Lanzo, its officers, agents or employees upon or by reason of such claims and to pay upon behalf of Lanzo, its officers, agents or employees, upon its demand, the amount of any judgment that may be entered against Lanzo, its officers, agents or employees in any such action.[14] [Emphasis added.]

This is an indemnity contract in connection with construction and, as such, it is governed by the construction industry indemnity statute, MCL 691.991. That statute requires courts to apply hold harmless agreements, even very broadly worded ones like the Lanzo-Wayne Steel contract, so that a party being indemnified cannot contractually shift liability if it is the solely negligent party.[15]

Agueros' trip and fall at the construction site and his lawsuit against Lanzo

Agueros pled that Wayne Steel, his employer, "assigned him to lift, carry and place metal rods" at the construction site.[16] He alleged that while "doing his assigned work" "lifting, carrying and placing long metal rods in a common work area on an upper level of the structure" he "tripped and fell on debris that employees of Defendant and/or its other subcontractors, negligently failed to remove from the area."[17] Agueros pled that Lanzo's role as general contractor gave it "overall control" of the area, as well as "non-delegable" duties to: "maintain

---

[14] *Id.* ¶9, p 4 of 12.

[15] A construction industry indemnity contract that does not expressly exclude a shift of liability for an indemnitee's sole negligence is not void. It is merely interpreted, consistent with MCL 691.991, to exclude indemnity for the indemnitee's sole negligence. See, e.g., *Redfern v R. E. Dailey & Co*, 146 Mich App 8, 16-17; 379 NW2d 451 (1985).

[16] ***Exhibit G,*** Agueros Complaint, ¶ 8.

[17] *Id*, ¶9-10.

the area in reasonably safe condition," "select employees and sub-contractors able to perform their assignments in a manner that would avoid risk of injury," and "supervise its employees and sub-contractors to ensure that their activities did not create conditions" that would cause Agueros any injury.[18] Agueros alleged that Lanzo should be "vicariously liable for negligence of sub-contractors."[19]

Lanzo's tender to Wayne Steel and Wayne Steel's denial of that tender.

On March 17, 2004, Lanzo formally tendered its defense of the *Agueros* lawsuit to Wayne Steel.[20] Lanzo's insurer, its agent, informed Wayne Steel about the allegations of the Agueros lawsuit. It provided a copy of the contract between Lanzo and Wayne Steel and, in Lanzo's tender letter, quoted the indemnity language. Lanzo tendered its "indemnification and defense" of the Agueros' lawsuit. Wayne Steel did not accept the tender.

The evidence supporting Agueros' comparative fault

Within the series of Lanzo briefs that comprise the trial court record, documented by specific transcript (and other) references, the evidence of Agueros' comparative fault was detailed, as follows:

- Agueros says he observed what he thought was a weak guardrail, and he brought that to the attention of a Wayne Steel supervisor, who in turn failed to report the situation to Lanzo (or anyone else).[21]
- Agueros admitted he knew he could properly refuse to work if he concluded there were unsafe conditions at the site, but he did not do so.[22]

[18] *Id*, ¶12-15.
[19] *Id*, ¶16.
[20] ***Exhibit I.***
[21] *Id*, p 56-68, 98.
[22] ***Exhibit L***, Agueros deposition forming part of summary disposition record, p 97.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

- Agueros chose his own path as he walked with bundles of re-bar and he was carrying the re-bar too close to the guardrail (a mere two inches) when he tripped and fell.[23]

- Agueros testified he simply "miscalculated" how much room he had to carry the re-bar when he struck a column and then fell:

Q. The thing that caused you to loose your balance was striking the re-bar on the column; would you agree with that?

A. I would agree that had something to do with it.[24]

* * *

Q. And the thing that caused you to lose your balance then was swinging the re-bar into the column as opposed to falling on something on the ground.

A. Correct.[25]

* * *

Q. You didn't see the column there as you're swinging the re-bar down?

A. I seen that it was there but I, you know, actually it was such to where I did it so many times, ***I just miscalculated it***, you know, how much room I had, actually had, you know.[26]

Lanzo Construction submits that *if it had tried the Agueros case instead of settling it*, the question of Agueros' potential comparative fault would *clearly* have been sent to the jury for a fact determination. Agueros identified a risk. He chose a path through a construction site that he claims was littered with debris.[27] He "just miscalculated" and swung his re-bar down, hitting the column, which caused him to lose his balance. In other words, at least in part, Agueros' own "miscalculation" caused his injury.

---

[23] *Id*, p 81("I took that route because it was the quickest…"), 88.
[24] *Id*, p 84-85.
[25] *Id*, p 85-86.
[26] *Id*, p 87-88.
[27] Although Agueros' complaint referred to debris as if it had contributed to his fall, Agueros admitted at his deposition that he had never complained about any debris, that he had contributed to it himself, and that debris had nothing to do with his trip and fall. ***Exhibit L***, Agueros deposition, pp 68-70, 44-45, 127.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

The evidence also supports Wayne Steel's negligence

Again, within the voluminous trial briefs, the evidence supporting Wayne Steel Erector's negligence was examined in detail. The points may be compactly summarized as follows:

- Agueros' foreman was Wayne Steel's Armando Barcenas. Agueros testified he showed Barcenas that the guardrail was loose by wiggling it and that Barcenas merely told Agueros to be careful and stay away from it.[28]

- In the Wayne Steel/Lanzo contract, Wayne Steel agreed it would keep its employees safe on the job: "The Subcontractor shall at is own cost and expense protect its employees...from risk of death, injury or bodily harm arising out of or in anyway connected with the Subcontractor's Work. * * *The Subcontractor shall strictly comply with the Contractor's safety program for the Project and with all safety policies and procedures of the Engineer and Owner."[29]

- Lanzo's superintendent, Jack Parinello, testified that every subcontractor is responsible for its own safety and has its own safety rules.[30]

- Lanzo installed the railing,[31] but its alleged defects were reported only to Wayne Steel's Barcenas. When Lanzo's superintendent was last at the site, the guardrail was sound.[32]

The Agueros' case settles, with Wayne Steel's counsel present as the settlement was placed on the record

Wayne County Circuit Court Judge Drain presided in the Agueros' case, as in the present case. He convened a settlement conference on July 29, 2004 that resulted in Lanzo and Agueros reaching a settlement. That settlement was placed on the record. Fernando Agueros

---

[28] ***Exhibit L,*** Agueros Deposition, p 58. ("He [Armando Barcenas] goes, you know how they are. He says just be careful. Don't go near it. Don't go near it whatever you do.")
[29] ***Exhibit F,*** ¶14, p 6 of 12.
[30] ***Exhibit M,*** Parinello Deposition, p 25, lines 13-14 ("Every sub has their own safety [rules] that they go by, also."
[31] ***Exhibit M,*** Parinello Deposition, p 18.
[32] ***Exhibit M,*** p 21,28.

answered his attorney's questions about authorizing acceptance of a $125,000 settlement.[33]

After agreeing to the settlement, his attorney asked Agueros to admit to his comparative fault:

> Q. You're asking the Court to approve the settlement in this case?
>
> A. Yes.
>
> Q. And isn't it true that you may have been partially **at fault** for this accident?
>
> A. ***Yes***.[34]

After Agueros spoke to the question of his comparative fault put to him by his own counsel, Lanzo's counsel asked whether this admission was made "freely and voluntarily:"

> MR. KUDLA: Just one question of Mr. Agueros. Mr. Agueros *the* ***admission*** *you made with regard to your comparative negligence* in this case was done freely and voluntarily?
>
> A. Yes.[35]

Agueros' admission of his comparative fault was entirely consistent with his own testimony, at deposition, that he "miscalculated it" when he swung the bundle of re-bar down and struck the column with one end of the bundle, causing him to lose his balance. Although Agueros blamed Lanzo for allegedly failing to provide him with a sturdy railing, the physical facts of the accident clearly implicated Agueros in terms of potential comparative fault.

Wayne Steel had notice of the settlement conference. Its counsel attended the settlement conference, but Wayne Steel refused to contribute to the settlement. Wayne Steel's attorney explained:

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

[33] ***Exhibit K***, 7/29/04 hearing Tr, p 4-5.
[34] *Id*, p 6.
[35] *Id*, p 7.

> MR. REED: Eric Reed, I was invited by both Mr. Fakhoury and Mr. Kudla to attend the settlement conference and actually made arrangements with your chambers to see if that was the court's pleasure and did appear and Wayne Steel is not contributing in any shape or form to the settlement.[36]

Attorney Reed announced that Wayne Steel was "not making any representations as to the reasonableness of this settlement,"[37] but Judge Drains declared that he found it reasonable:

> THE COURT: I think this settlement is a fair and reasonable one given all that I know about the case. I'll approve the settlement.[38]

The trial court's summary disposition indemnity rulings

Judge Drain listened to Lanzo's counsel's argument. He asked no questions but, at the conclusion said: "I think the issue is solely whether it's a sole negligence question or not."[39] Wayne Steel argued, inaccurately as will be seen by Argument II (within), that Lanzo's "burden in this case" was to "prove [Lanzo's] actual liability to Mr. Agueros."[40]

Judge Drain decided that it was Lanzo's burden to prove that it wasn't solely negligent: "Okay. One of the things that has to be proven **by Lanzo** is that they weren't solely negligent."[41] He decided that Lanzo had not met that burden:

> [E]ssentially what you've been arguing is that the plaintiff in his underlying case was contributorily negligent. And I don't think he ever really said that or there isn't enough facts to show that he was contributorily negligent. And from all elements I can see, Lanzo was solely negligent with regard to the rail and the debris.[42]

---

[36] *Id* p 6-7.
[37] *Id*, p 7.
[38] *Id*, p 7.
[39] ***Exhibit N***, 5/20/05 hearing transcript, p 5.
[40] *Id*, p 6.
[41] *Id*, p 12. In fact, to defeat Wayne Steel's motion for summary disposition all Lanzo needed to show was that there was an issue of fact about Agueros' or Wayne Steel's negligence.
[42] *Id.* The issue of debris in the site is a red herring. Agueros contended that debris had nothing to do with his fall. See ***Exhibit L***, Agueros Deposition, p 127. If it *is* an issue, Agueros admitted that he contributed to the debris on the floor where he was carrying and moving re-bar. ***Exhibit L***, p 44-45.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Judge Drain granted Wayne Steel's summary disposition motion and denied Lanzo's. He later denied Lanzo's timely-filed Motion for Reconsideration, finding no "palpable error by which the court and the parties have been misled" such that "a different disposition of the motion must result from the correction of the error."[43]

The Court of Appeals' decision

The Court of Appeals' panel, consisting of Judges Pat Donofrio, Stephen Borrello and Alton Davis, understood that before the trial court's ruling could be affirmed the panel would have to decide whether: (1) the indemnity contract applied to this accident (it answered that question "yes") and (2) whether Lanzo was the solely negligent party:

> Resolution of the issue on appeal requires this Court to undertake a two-part analysis. First, we must determine whether the indemnification agreement at issue in this case provides for indemnity under the facts of this case. Second, we must consider whether there was a genuine issue of material fact regarding whether plaintiff's [Lanzo's] sole negligence was the cause of the underlying plaintiff's [Agueros'] injuries.[44]

The panel examined the contract language and ruled that "the indemnity provision in the contract between plaintiff and defendant provides for indemnity under the facts of this case."[45] "By its unambiguous terms, the indemnity provision clearly intended to provide plaintiff with indemnity protection for injuries or damages resulting from its own negligence."[46]

The panel decided "that there is no genuine issue of material fact regarding whether the injury to the underlying plaintiff was the result of the sole negligence of plaintiff [Lanzo]."[47] But it considered that question *only* as if Lanzo's argument were rooted solely in the settlement hearing testimony and in the pleadings from the underlying case, rather than in the physical

---

[43] ***Exhibit O***, 7/6/05 Order Denying Plaintiff's Motion for Reconsideration.
[44] ***Exhibit A***, Slip Op, p 2.
[45] *Id.*
[46] *Id.*
[47] *Id* at, p 4.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

facts of the accident and Agueros' deposition testimony. The panel decided Lanzo was the only negligent party:

> In sum, *because the underlying complaint and the underlying plaintiff's testimony at the settlement hearing do not create a question of fact regarding whether plaintiff was solely negligent*, we hold that the trial court was correct in concluding that plaintiff was seeking indemnity for liability based on its sole negligence and in granting defendant's motion for summary disposition.[48] [Emphasis added.]

Lanzo did not argue that the underlying plaintiff's pleadings about the negligence of Lanzo "subcontractors" was dispositive on the issue of the existence of other negligent parties (though such a complaint was one factor to be considered). Instead, what Lanzo argued was that the physical facts of how Agueros claimed to fall and his implicating the Wayne Steel foreman in his decision to continue to work in what Agueros claimed was an unsafe work environment, created an issue of fact on the question of Agueros' and Wayne Steel's negligence.

Lanzo also argued that the combination of the burden shifting that occurs when an indemnitee gives proper notice to its indemnitor of an impending settlement and Agueros' admission of fault at the settlement hearing created a situation where *Lanzo* had demonstrated that it was not the sole (only) negligent party. The panel rejected that argument by deciding that it could somehow know that Agueros was not to be believed when he admitted his comparative fault. Agueros' admission was discounted primarily because the panel thought it discerned an incentive for him to lie:

> In support of its motion for summary disposition, plaintiff also attached the transcript from the settlement hearing in the underlying case in which the underlying plaintiff admitted that he may have been partially at fault for the accident. We find that this transcript does not establish a genuine issue of material fact because ***it was motivated by the underlying plaintiff's desire to reach a settlement*** *with plaintiff in that case* and because it

[48] *Id.*

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

> specifically contradicts his deposition testimony that plaintiff was the only liable party.[49] [emphasis added]

The notion that Agueros' admission somehow contradicted his deposition testimony was not explained by the panel. Lanzo has recounted Agueros' deposition testimony here. His admission of fault not only did not contradict that testimony, it was *consistent* with his deposition testimony that he had "miscalculated" when he tossed the re-bar down, struck the column, and caused his loss of balance.

In summing up its ruling, the panel revealed that it had not taken Agueros' deposition testimony about his own fault into account or his testimony about how Wayne Steel's foreman directed him to continue working despite what they both deemed unsafe conditions. The only matters the panel considered were Agueros' pleadings and his in-court admission when, in fact, his deposition testimony was crucial:

> In sum, because the underlying complaint and the underlying plaintiff's testimony at the settlement hearing do not create a question of fact regarding whether plaintiff was solely negligent, we hold that the trial court was correct in concluding that plaintiff was seeking indemnity based on its sole negligence and in granting defendant's motion for summary disposition.[50]

Lanzo sought reconsideration, concentrating on the trial court proofs (only one factor of which Agueros' testimony at the settlement hearing) that showed Agueros to potentially be comparatively at fault. The Court of Appeals' panel was not persuaded and denied rehearing in its March 16, 2006 order.

[49] ***Exhibit A***, Slip Op, p 4.
[50] ***Exhibit A,*** Slip Op, p 4.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT OF STANDARD OF REVIEW

This Court reviews a trial court's decision to grant a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 304-305; 690 NW2d 528 (2004). "The proper construction and interpretation of a contract is a question of law" subject to de novo review. *Bandit Indus v Hobbs Int'l, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001), citing *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998) In the contractual indemnity context, see, e.g., *Eller v Metro Industrial Contracting*, 261 Mich App 569, 571; 683 NW2d 242 (2004); *Grand Trunk Western Railroad v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). Under de novo review, an appellate court gives no deference to the lower courts and reviews the case with fresh eyes. *Fletcher v Fletcher*, 200 Mich App 505, 512; 504 NW2d 684 aff'd in part rev'd in part on other grounds, 447 Mich 871; 526 NW2d 889 (1994).

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

ARGUMENT I

Wayne Steel's employee (Agueros) stumbled when he miscalculated and struck a column with re-bar he was carrying. He also admitted negligence at the settlement hearing. Wayne Steel's foreman was advised of an alleged faulty railing that Agueros mostly blames for his fall, but the foreman told Agueros to keep working. The Lanzo/Wayne Steel indemnity contract shifts all liability for Agueros' injury from Lanzo to Wayne Steel except if Lanzo is the solely negligent party. MCL 691.991. At a minimum, the record supports a material issue of fact on the existence of also-negligent parties so that Wayne Steel's summary disposition motion should have been denied.

a. Generally applicable indemnity contract principles

Indemnity contracts are construed in the same way as are contracts generally. *Triple E v Mastronardi*, 209 Mich App 165, 172530 NW2d 772 (1995); *Zurich Insurance v CCR & Co (On Reh)*, 226 Mich App 599, 603; 576 NW2d 392 (1996). "Where the language of a writing is not ambiguous, its construction is a question of law for the court...and it is the duty of the court, not the jury, to define what is and what is not within the terms of a written contract." *Craib v Presbyterian Church*, 62 Mich App 617, 621; 233 NW2d 674 (1975). In accord, in the indemnity context, see, e.g., *Chrysler v Brencal*, 146 Mich App 766, 775; 381 NW2d 814 (1985).

So long as the contract of indemnity is unambiguous, its construction is for the court to determine as a matter of law "and the plain meaning of the [indemnity] contract may not be impeached with extrinsic evidence." *Zurich Insurance, supra* at 604. As this Court explained in *Michigan Chandelier v Morse*, 297 Mich 41, 49; 297 NW 64 (1941) quoted approvingly in *Zurich Insurance* at 603-604, it is the parties' *words* that matter in determining intent:

> We must look for the intent of the parties in the words used in the instrument. This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.

In fact, "The law presumes that the parties understand the import of a written contract and had the intention manifested by its terms. *Zurich Insurance* at 604, citing *Birchcrest Bldg v Plaskove*, 369 Mich 631, 637; 120 NW 2d 819 (1963). In other words: "This Court must determine the intent of the parties to a contract by reference to the contract language alone. This Court may not look outside the contract to assess the parties' intent." *Martin v City of East Lansing,* 249 Mich App 288, 291; 642 NW2d 700 (2001).

As in any contract context, the intention of the parties is gleaned from the contract as a whole, not from review of detached or isolated portions of it. The words of the entire contract are to be considered, reconciling and giving meaning to all of its parts whenever possible. *Arrow Sheet Metal Works v Bryant & Detweiler Co*, 338 Mich 68, 76; 61 NW2d 125 (1953). "An indemnity clause should be interpreted to give a reasonable meaning to all its provisions." *MSI Construction v Corvo*, 208 Mich App 340, 343; 527 NW2d 79 (1995).

At times, in the trial court, defendant trotted out a completely discredited theory that it could not be contractually responsible to hold Lanzo harmless because Agueros' sued only Lanzo for negligence. Even the "old" line of cases in Michigan permitted parties to enter into indemnity contracts where the indemnitee would be indemnified for its own negligence, so long as this intent was "expressed in unequivocal terms." See for example, the discussion in *Chrysler Corp v Brencal Contractors, Inc.*, 146 Mich App 766, 772; 381 NW 2d 814 (1986). By the mid 1970s, however, the Michigan Court of Appeals discarded the notion that the intent must be "expressed in unequivocal terms":

> Earlier cases imposed the additional rule of construction that indemnification contracts will not be construed to indemnify the indemnitee against losses from his own negligent acts unless such an intent is expressed in unequivocal terms. ***That rule of construction no longer applies***. [*Chrysler, supra* at 771-773 (citations omitted).]

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

For additional cases recognizing that the old rule of construction is discredited, see *Vanden Bosch v Consumers Power Co.*, 394 Mich 428; 230 NW 2d 271 (1975); *Pritts v JI Case*, 108 Mich App 22, 28; 310 NW 2d 261 (1981). The notion that indemnity contracts do not indemnify for an indemnitee's own negligence unless such an intent is expressed clearly and unequivocally in the contract has been "discarded." *Sherman v DeMaria Building Co*, 203 Mich App 593, 596; 513 NW 2d 187 (1994). Any suggestion that Wayne Steel should not be bound by its contractual promise to indemnify Lanzo for "someone else's negligence" would have been unsupported by Michigan law even if it had been made two decades ago. Any assertion in 2006 is completely untenable. In addition, this contract specifically states that Wayne Steel will indemnify even for Lanzo's negligence.[51] As the Court of Appeals held, the Lanzo/Wayne Steel contract applies to the Agueros loss.

b. MCL 691.991, the Construction Industry Indemnity Statute, merely prohibits enforcement of indemnity agreements in favor of a solely (only) negligent party. Either Agueros' comparative fault or Wayne Steel's fault will supply the "also-negligent" party that potentially relieves Lanzo from the constraints of the statute.

MCL 691.991 provides that an indemnity clause in a construction-related contract will not be enforced to the extent it seeks to indemnify a party for its own "sole" negligence:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. [MCL 691.991 (emphasis added).]

[51] ***Exhibit F***, ¶9. Wayne Steel agrees to indemnify Lanzo even for Lanzo's "alleged active or passive negligence or participation in the wrong."

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Contracts of indemnity are enforceable, even if they do not express the sole negligence exception, because the statute merely prohibits an indemnitee from recovering for its sole negligence. See, e.g., *Robertson v Swindell-Dressler*, 82 Mich App 382, 400-401; 267 NW 2d 131 (1978); *Ford v Clark Equipment,* 87 Mich App 270, 275-276; 274 NW 2d 33 (1978). The statute announces a public policy that, in the building and construction industry, parties may not secure indemnity when theirs is the only negligent conduct. *Pritts, supra* at 34.

Michigan does not resolve the question of the existence of an "also-negligent" party by looking only to the four corners of the personal injury plaintiff's complaint. The plaintiff's choice of who to sue, or indeed a defendant's choice about who to wait to sue, cannot magically negate the existence of an also-negligent party. If the rule were otherwise, as defendant urged below, a significant group of cases decided under MCL 691.991 would have to be scrapped.

Court of Appeals precedent has now established that the MCL 691.991 sole negligence exception is inapplicable if there is fault on the part *of any person* including the injured plaintiff. Even if the party seeking indemnification is the only defendant at fault, if there are "allegations of comparative negligence" against the primary plaintiff, the statute "is not violated" because the party seeking to be indemnified "is not seeking indemnification from damages based on injuries caused solely by" its own negligence. *Sherma, supra at* 601. In *Sherman,* the Court of Appeals adopted the rules articulated in *Fischbach-Natkin Co. v Power Process Piping, Inc.*, 157 Mich App 448; 403 NW 2d 569 (1987) and *Burdo v Ford Motor Co.*, 828 F2d 380 (CA 6, 1987). Those cases stand for the proposition that "even a modicum of fault by a third party – including the plaintiff – prevents a finding of sole negligence." *Turner Construction Co v Robert Carter Corp*, 162 F3d 1162 (CA 6, 1998).[52]

[52] ***Exhibit P***, *Turner Construction Co v Robert Carter Corp* unpublished 1998 US App LEXIS 20544.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

As recently expressed in *Papalas v Metro Piping*, unpublished opinion per curiam of the Court of Appeals issued November 8, 2005 (Docket Nos. 252470, 252527),[53] an opinion that included both Judge Borello and Donafrio (who sat on the present panel as well), the existence of another negligent party negates an indemnitee's sole negligence:

> An indemnitee that is found to be comparatively negligent with others for the injury may enforce an indemnity provision, since, *if comparatively negligent with the others, the indemnitee is not solely negligent. Fischbach-Natkin Co c Power Process Piping*, 157 Mich App 448, 452; 403 NW2d 569 (1987); see also *Sherman [v DeMaria Bldg*, 203 Mich App 593 (1994)] *supra* at 596-601. *18 [emphasis added].

After pointing out that the underlying plaintiff had sued others for negligence, in addition to Ford, the *Papalas* panel wrote that "it was possible that parties other than Ford were comparatively negligent." *Id* *19. That being so, "Ford was not seeking indemnification for its sole negligence and indemnification was contractually required." *Id.* In fact, in the *Papalas* case the panel apparently made the same error as in the present case but in the "opposite" direction favoring Ford, the indemnitee. It disregarded whether the indemnitor could prove Ford's sole negligence and wrote of indemnity being "contractually required" and concluded that the rationale supporting a causal link to Metro Piping's performance of the work "allows Ford to prevail against Piping on its indemnification claim." *25.

At a minimum, there were material issues of fact about whether someone else besides Lanzo was negligent and about whether Lanzo was negligent at all

The facts of Agueros' negligence were well-documented in the trial court. Agueros testified in his deposition that he "miscalculated" "how much room [he] had" between the bundle of re-bar in his arms and the column he struck. He agreed ("Correct") that he took the route he did "because it was the quickest."[54] Agueros' testimony about how his Wayne Steel

[53] ***Exhibit D,*** *Papalas v Ford Motor*, 2005 Mich App LEXIS 2760.

foreman instructed him to continue working even though he reported the allegedly unsafe railing to the foreman (but no one reported it to Lanzo) also supports Wayne Steel's own negligence. Finally, Lanzo's *lack* of any negligence remained at issue because merely settling the Agueros case was no admission of Lanzo's liability.

When it came to indemnity litigation, on the record of this case, only Lanzo could win summary disposition—given Agueros' in-court admission of negligence (See Argument II). At a minimum, this Court should peremptorily reverse the grant of summary disposition in Wayne Steel's favor and remand for a jury determination about whether another's negligence exists so that Lanzo cannot have been solely negligent.

Issues of fact about the existence (or not) of negligence must be decided by juries, not judges.

There is a long history in Michigan of respecting "issues of fact" on the question of whether or not someone was negligent. In *Miller v Miller,* 373 Mich 519, 525; 129 NW2d 885 (1964) this Court explained "the question of negligence is a question of fact and not of law" "because its existence depends upon conformance with or violation of standards of behavior peculiarly within the special province of a jury to determine." Summary disposition should "rarely" be granted when negligence is disputed. *Id.* "The reasonableness of a party's conduct under any given circumstance is almost always a question for the jury." *Simonetti v Rinshed Mason Co*, 41 Mich App 446, 455; 200 NW 2d 354 (1972).

"[T]he same standards which are applicable in determining a defendant's negligence are applicable in determining a plaintiff's comparative negligence." *Zalut v Andersen & Associates*, 186 Mich App 229, 235; 463 NW2d 236 (1990). "[T]he question of a plaintiff's own negligence for failure to use due care for his own safety is a jury question unless all reasonable minds could not differ or because of some ascertainable public policy

[54] ***Exhibit L,*** Agueros deposition, p 81.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

determination." *Rodriguez v Solar of Michigan*, 191 Mich App 483, 488; 478 NW 2d 914 (1991), citing *Lowe v Estate Motors*, 428 Mich 439, 455-461; 410 NW2d 706 (1987). In accord, *Lair v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005). As the *Lowe* Court explained at 457-458, quoting approvingly to *Moning v Alfono*, 400 Mich 425, 435-436; 254 NW2d 759 (1977):

> The preference for jury resolution of the issue of negligence is...rooted in the belief that the jury's judgment of what is reasonable under the circumstances of a particular case is more likely than the judicial judgment to represent the *community*'s [emphasis added] judgment of how reasonable persons would conduct themselves. *Lowe, id*, emphasis and editing by the *Lowe* court.

In accord with the foregoing, accepting that juries are the ones who decide if injured plaintiffs are comparatively at fault, see, e.g. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998) [summary disposition in defendant's favor reversed; panel declines to address comparative fault because "the relative negligence of plaintiff and defendant" "is a matter that should be decided by the finder of fact"].

From the core physical core facts of the accident, even as Agueros testified to them at his deposition, a jury could very easily find that Agueros was partly responsible for causing his injury. With that determination, Lanzo would not be the solely negligent party and Wayne Steel would be required to indemnify Lanzo.

The question of whether plaintiffs who trip or slip or fall are comparatively at fault is a quintessential issue of fact

In many slip and fall type cases, appellate courts have been called on to decide whether there were material issues of fact about an injured party's comparative fault. The role of the jury in making such determinations is to be honored, not dishonored, as it was in the present case. In *Charleston v Meijer*, 124 Mich App 416, 417; 335 NW2d 55 (1983) a plaintiff fell on water on the floor of defendant's store and challenged whether the issue of comparative fault

should have been sent to the jury. The panel answered, "Yes," explaining: "The trend is towards allowing all issues to go to the jury and away from arbitrary policy decisions."

In *Duke v American Olean Tile*, 155 Mich App 555; 400 NW2d 677 (1986) the Court of Appeals reversed a jury verdict in plaintiff's favor, in a case against the manufacturer of the floor tiles in the building where plaintiff's decedent fell. Reversal was required, in part, because defendant was denied a comparative fault instruction: "[V]iewing the evidence most favorably to defendant, a factual question regarding [the decedent's] exercise of due care was raised, and the request for an instruction on comparative negligence should have been granted."

In *Ferguson v Delaware International Speedway*, 164 Mich App 283, 293; 416 NW2d 415 (1987) the panel agreed with defendant that a comparative fault instruction was correctly supplied to a jury in a case where plaintiff slipped and fell on a hill at defendant's speedway. The plaintiff testified "the hills was dark and steep and that the grass was dewy" but the panel wrote that the plaintiff "could just as easily [have] fallen from her own doing, i.e. while distracted by her grandson or looking for her car."

Consider, as well, *Bender v Farmington Ridge*, unpublished opinion per curiam of the Court of Appeals, issued September 8, 2000 (Docket No. 208545).[55] On cross-appeal, the plaintiff challenged the reading of a comparative fault instruction. The Court of Appeals affirmed the reading of the instruction, explaining "that there was evidence at trial to warrant an instruction on comparative negligence." "Reasonable minds could conclude that plaintiff was partly at fault given her testimony that she observed salt on the sidewalk on the cold morning of the incident and acknowledged that the presence of salt could mean there were potentially hazardous condition." *Id*, p 3. In addition, plaintiff "stepped into the carport even though she could not see where she was stepping and took no added precautions to insure her safety." *Id.*

[55] ***Exhibit Q***, *Bender v Farmington Ridge*, 2000 Mich App LEXIS 1010.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Contractual indemnity sole negligence cases must respect that issues of fact are for juries to decide

In addition to "pure" negligence law, contractual indemnity law teaches that Wayne Steel is not entitled to summary disposition. Wayne Steel cannot show that Lanzo is the solely negligent party because there are issues of fact about Agueros' (as well as Wayne Steel's) comparative fault.

Among the issues considered in *Trim v Clark Equipment*, 87 Mich App 270; 274 NW2d 33 (1987), reasoning rejected in part (other grounds) *Grand Trunk RR v Auto Warehousing, supra*, was the question of whether the contractual indemnity action was properly submitted to a jury. To be granted indemnity, Clark Equipment needed to show that the liability it was trying to shift to Harroun, arising out of injuries to two Harroun employees, was not caused by Clark's sole negligence. As in the present case, the party seeking indemnity had settled with the underlying injured party. After an extensive discussion of concepts related to "sole negligence" in the indemnity context, the Court of Appeals wrote: "The trial court was correct in submitting the case to the jury because questions of fact exist on many points." *Trim* at 279.

In *Lindsey v City of Detroit,* unpublished opinion per curiam of the Court of Appeals, issued June 27, 1997 (Docket No. 183512)[56] a worker (Lindsay) filed a lawsuit for injuries sustained when he jumped from a catwalk to escape what he thought was a methane gas ignition in a pipe that he was welding. He sued the City of Detroit, who owned the project, and Best, apparently a general contractor. Best and the City sued Lindsey's employer, Ben Washington & Sons, a subcontractor on the job. Ben Washington agreed to indemnify Best and the City "to the fullest extent permitted by law," which would not have included indemnity for "sole negligence" because that is prohibited by MCL 691.991. In the initial opinion, the

---

[56] ***Exhibit R,*** *Lindsey v City of Detroit*, 1997 Mich App LEXIS 1192 (original opinion and opinion on rehearing).

panel held that summary disposition on the indemnity claim was improperly granted to Best and the City. The information that Lindsay was found to be comparatively at fault in his lawsuit against Best framed the rehearing issue for the panel. Instead of reversing the grant of summary disposition, the panel affirmed it, remanding the case for a determination of the effect of that finding given that the contract in question, unlike the Lanzo contract, contained a "comparative" indemnity clause akin to the one at issue in *MSI Construction Managers v Corvo Iron Works*, 208 Mich App 340 (1995). Lanzo seeks the opportunity to prove, to a jury's satisfaction, that either Agueros or Wayne Steel were partially at fault for the injuries caused.[57]

Department of Social Services v Aetna, 177 Mich App 440; 443 NW 2d 420 (1989) is especially instructive, though it involved application of a "sole negligence" insurance contract term. The insurance policy excluded coverage "for damages arising out of bodily injury to any person...resulting from the *sole negligence* of the state, its officers, employees or agents." In the underlying case, Anita Ray slipped on water on the floor of a DSS waiting room. She sued the owner of the building and DSS. The owner was found not to be liable, but Ray recovered a verdict against DSS. The trial court held that insurance coverage was owed because the insurer would not—as a matter of law—be able to prove DSS was solely negligent. The panel explained the "heavy burden" a party faces when trying to show, as Wayne Steel must in the present case, that a party was solely negligent:

> ...Aetna had the heavy burden of proving that DSS was *one hundred percent negligent* with respect to Mrs. Ray's injuries—that there were no concurrent proximate causes. *Id* at 422 [emphasis added].

The *Dept of Social Services* panel wrote that "at the very least" Aetna would have to show that the wet substance on the floor "resulted from the negligence of DSS, a DSS employee, or

[57] And, indeed, Lanzo seeks to the opportunity to prove that it was not negligent.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

someone within the control of DSS." The panel went on to explain that the insurer, situated as is Wayne Steel in this case, would have to present rigorous proofs to negate the possibility of sole negligence:

> However, to establish that DSS was solely negligent, the even heavier burden was on Aetna to prove that a client or some other non-DSS employee did not spill the wet substance or assist in causing it. *Id* at 423.

The panel determined, as a matter of law, that Aetna would not be able to demonstrate sole negligence, given the hundreds of DSS clients who passed through the waiting room daily and the fact that those clients were permitted to bring in food and beverages.

The lower courts' opinions dishonor the role juries serve in deciding whether a party is negligent

Similar to the injured party in all of these cases, *at a minimum,* there are material questions of fact to be tried on the issue of whether Ferndando Agueros took reasonable precautions for his own safety and whether his conduct caused, in part, the injury that occurred. He was not looking where he was going. He was moving about what he testified was a debris-strewn work area, within inches of what he considered to be an unsafe guardrail, carrying a large bundle of re-bar. He "miscalculated" his path, struck a column with the re-bar, and knocked himself to the ground. For reasons grounded in the record and having nothing to do with what the Agueros' complaint pled or even with what he testified to at the settlement hearing, Wayne Steel is not entitled to a grant of summary disposition against Lanzo. Additionally, the fact that Agueros voluntarily admitted his comparative negligence while he settled his case is another factor suggestive of his comparative fault. The Court of Appeals' willingness to suppose that his testimony was false shows an appellate panel improperly playing the role of fact finder.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

ARGUMENT II

Lanzo gave Wayne Steel notice of Agueros' lawsuit, tendered its defense, and even gave Wayne Steel an opportunity to participate in the settlement. To recover on its indemnity claim post-settlement, Lanzo only needed to show its "potential" not "actual" liability. *Grand Trunk Western RR v Auto Warehousing*, 262 Mich App 345 (2004). Agueros' judicial admission of comparative fault, supported by his deposition testimony, met that reduced burden. Lanzo was entitled to summary disposition.

a. When an indemnitor (Wayne Steel) had notice of the claim and refused to defend, the indemnitee (Lanzo) who settles the claim need only show potential not actual liability to recover from the indemnitor.

There is no dispute that: (1) Lanzo tendered its defense of the Agueros' lawsuit to Wayne Steel, (2) that Wayne Steel refused that tender, and (3) that Wayne Steel refused, in proceedings in open court while represented by counsel, to contribute to the $125,000.00 settlement with Agueros.

Michigan public policy encourages settlement of suits. Settlement benefits not only private litigants, but also the public. "If this policy [encouraging settlements] is to be effective, the burden on the defendant who settles after a tender of defense to the contractual indemnitor is refused must not be too heavy." *Ford v Clark Equipment, supra* at 277. Accordingly, an indemnity plaintiff who settles an underlying case and then sues its indemnitor need only prove its "potential" rather than its "actual" liability to the injured party. This distinction is crucial. "Potential" liability is a piece of cake to prove:

> *Potential liability actually* ***means nothing more than*** *that the indemnitee* ***acted reasonably*** *in settling the underlying suit.* The reasonableness of the settlements consists of two components which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. *Ford* at 278 [emphasis added]

In the present case, Wayne Steel has not articulated any reason why the $125,000 settlement was not reasonable in light of Lanzo's risk of exposure versus the possibility of a "no cause." The trial court found the settlement was reasonable.

In *Grand Trunk Western Railroad v Auto Warehousing, supra,* the Court of Appeals adhered to the portion of the *Ford v Clark Equipment* ruling just discussed regarding "potential" liability. The *Grand Trunk* panel strengthened the position of the indemnity plaintiff who settles with an underlying party after tender of defense is refused, with its burden-shifting holding. The panel first restated and relied upon the *Ford* decision for the "potential" liability analysis:

> It is well-settled that if an indemnitor denies liability and refuses to assume the defense of a claim under a contract of indemnity, the indemnitee, without waiving its right to indemnification, may enter into a good faith, reasonable settlement with the claimant. [cites omitted] In that circumstance, the indemnitee need only show that it had potential liability and that the settlement amount was reasonably related to the liability exposure and the employee's injuries. *Grand Trunk* at 358.

Next, the *Grand Trunk* panel turned to the issue of whether the railroad's $625,000 FELA settlement with an employee who slipped on open and obvious ice and injured his left shoulder and right knee met the "potential liability" standard. The majority affirmed the trial court's grant of summary disposition in the railroad's favor. It ruled that a showing of "reasonableness in an indemnity suit should not involve a plenary trial of the underlying [] issues." *Id* at 360, quoting approvingly to *Burlington Northern v Hughes Bros*, 671 F2d 279, 283 (CA8, 1982). The indemnitor defendant in *Grand Trunk* was held to have failed to *meet **its** burden* of proving that the railroad could have successfully defended the underlying claim:

> Given the FELA standard for liability, and the evidence, ***defendant has failed to meet its burden of proving*** *that the suit would have been successfully defended.*

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

> Defendant's argument that it cannot be assumed that [the underlying plaintiff] would have been successful in his claim is insufficient to survive plaintiff's motion for summary disposition on the issue of potential liability. If a party opposed a motion for summary disposition fails to present evidentiary proofs establishing the existence of a material factual dispute, summary disposition is properly granted. *Grand Trunk* at 360. [Emphasis added.]

This was the result even though the indemnity defendant was faced with a situation where $625,000 of a $725,000 settlement was allocated to the one injury for which indemnity was potentially owed rather than to another injury that fell outside the scope of defendant's indemnity obligation. This was the result even though the injured plaintiff failed to heed specific instructions from a supervisor that, if followed, would have prevented the injury. The panel concluded defendant's arguments did "not raise a triable issue of fact concerning whether the settlement was reasonable." *Id* at 359. The panel ruled that "to expand the analysis of the reasonableness of a settlement to include plenary consideration of liability issues in the underlying litigation" "would contravene the policy of encouraging the settlement of lawsuits." *Id* at 361.

What cases such as *Grand Trunk* and *Ford v Clark Equipment* teach is that Lanzo's position in terms of indemnity is greatly enhanced by the fact that it stepped up to the plate and settled with the injured party after providing Wayne Steel with notice of the claim and an opportunity to participate in settlement. In the indemnity lawsuit that follows, a *huge* burden rightfully settles upon Wayne Steel, not on Lanzo as the trial judge (and apparently the Court of Appeals) supposed. Lanzo "wins" summary disposition if "defendant [Wayne Steel, here] failed to raise a triable issue of fact regarding plaintiff's [Lanzo's] potential liability to [Agueros] for his [2000] injuries and the reasonableness of the settlement." *Grand Trunk* at 361.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Wayne Steel's main defense to the indemnity lawsuit—trying to "prove" that Lanzo's liability as a general contractor at a construction site potentially settles a difficult bundle of liability upon Lanzo—is a "defense" that by rights ought to have completely backfired.

In the lower courts, Wayne Steel spent pages and pages of its briefs and many pages of its exhibits trying to show that Lanzo was at fault in Agueros' accident. Presumably it will take the same approach in this forum. To the extent this Court may be convinced as to Wayne Steel's arguments on this point, all Wayne Steel has succeeded in doing is *bolstering* Lanzo's position in this indemnity case. Wayne Steel's lower court briefs—if they were convincing—are a detailed rendering of how Lanzo was at risk of "potential liability" to Agueros and how a $125,000 settlement was obviously a reasonable course for Lanzo to take.

Under *Ford* and *Grand Trunk*, Wayne Steel has completely failed to show "that [Agueros'] suit would have" or could have "been successfully defended" and *that* is the kind of showing it would take for Wayne Steel to preclude Lanzo from "recover[y] on the indemnity claim." *Grand Trunk* at 357.

Wayne Steel's decision to try to "prove" Lanzo's sole negligence as an end run around its burden of disproving Lanzo's potential liability to Agueros ought to have failed completely.

In *Grand Trunk*, the panel was construing an indemnity contract that contained a "sole negligence" exception even though it appears not to have been considered as if it were a contract subject to MCL 691.991.[58] The indemnity agreement that applied required the defendant Auto Warehouse Company "to indemnify, defend, and hold plaintiff harmless from any claims arising from personal injuries unless caused by the sole negligence of plaintiff, its agents or employees." *Grand Trunk* at 348. The panel had to consider how the sole negligence considerations would square with the rules of "potential liability" that apply when an

[58] The contract was a lease of "sidetrack property" that included a requirement that the defendant remove ice and snow from the premises. MCL 691.991 was not referred to, but note that the statute applies to "maintenance" agreements as to "a building, structure, appurtenance."

indemnitee has provided notice of the claim and the indemnitor declines to accept tender of defense. It decided—that sole negligence considerations had nothing to do with the inquiry.

The indemnity defendant in *Grand Trunk* argued "that plaintiff had the burden of showing that [the injured party's] claims were covered under the indemnity provisions of the lease, before the trial court could embark on an analysis of potential liability and whether the settlement was reasonable." *Id* at 356. The panel wrote that the defendant was using *Ford* to argue "somewhat circuitously that a prerequisite to the application of the potential liability rule is that indemnity is owed pursuant to contract." It wrote about how defendant was arguing against the trial court's grant of summary disposition in the railroad's favor, saying "questions of fact remained regarding whose negligence causes [the injured party's] injuries, and whether defendant breached the duty regarding ice and snow removal." *Id* at 357. The arguments that the defendant in *Grand Trunk* made, unsuccessfully on appeal, are essentially the same arguments that Wayne Steel made in the lower courts—successfully. The *Grand Trunk* majority found "defendant's reasoning flawed." *Id.* After allowing oral argument on Grant Trunk's Application for Leave to Appeal, this Court denied leave. See 474 Mich 915 (2005).

Defendant Wayne Steel convinced the trial court, and then asked the Court of Appeals, to delve into the intricacies of who can be liable for what, as between general contractors and subcontractors, at a construction site. That is not an inquiry that matters in post-settlement litigation of indemnity issues. This is so because "fact issues" are tied up with *potential* liability, which is *not* (or almost never and surely not here) going to win the day for an indemnitor positioned as Wayne Steel is here. The *Grand Trunk* panel explained how and why "fact issue(s)" dissolve and provide no safe haven for reclusive indemnitors who refuse to participate in a settlement:

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

> [D]efendant argues on appeal that summary disposition was improper because, at a minimum, there were factual issues regarding the reasonableness of a defendant's snow removal and [the injured party's] sole negligence. Defendant's concession that there were factual issues on the issue of negligence essentially is a concession of potential liability and precludes any argument that defendant had no duty to defend on the basis that there was no liability under the parties' lease. * * *Grand Trunk* at 359.

Wayne Steel did not concede the question of issues of fact regarding sole negligence. It pressed the issue in the lower courts (as presumably it will do here) that Lanzo's conduct was so "obviously" negligent and its own conduct and that of Agueros' was so "obviously" lacking in negligence, that the sole negligence exception to the contract should be activated. In fact, as demonstrated in Argument I, there is enough potential negligence in this case—both as to Wayne Steel and certainly as to Agueros-- to serve Lanzo well in terms of its MCL 691.991 indemnity position. And, assuming this Court disagrees with Wayne Steel's and the lower courts effort to ignore material issues of fact about the negligence of others besides Lanzo, *Grand Trunk* teaches that even a "mere" issue of fact with respect to sole negligence means that Lanzo's motion for summary disposition should have been granted and Wayne Steel's should have been denied. Such issues of fact merely percolate through the "potential liability" analysis and, with that, Wayne Steel should have lost its motion for summary disposition and Lanzo should have won its motion.

Wayne Steel relied on the *Ford* case in the lower courts and may try to do so here as well, with respect to the interaction between sole negligence concepts and issues of potential liability. To the extent that *Grand Trunk* and *Ford* disagree, *Grand Trunk* controls under MCR 7.215(J)(1) because this Court has never addressed the issue. *Grand Trunk* settled the burden of proving an indemnitee's sole negligence on the indemnitor ("if defendant had shown that [the injured party's] injuries were caused by the sole negligence of...") while *Ford* says it is the

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

indemnitee who "must show...that the liability was not the result of [its] sole negligence." *Ford* at 270; *Grand Trunk* at 357. Even if the burden rests with Lanzo on this point it met that burden by Agueros' judicial admission, including as that admission is supported by the evidentiary record.

The existence of an also-negligent party is proven, as a matter of law, given Agueros' admitted comparative fault.

A "judicial admission," such as Agueros' admission on the record in open court about his comparative fault, "is a distinct, formal, solemn admission made for the express purpose of dispensing with the formal proof of some fact at trial." *Ortega v Lenderenk*, 382 Mich 218, 222-223; 169 NW2d 470 (1969); *Tozer v Kerr*, 342 Mich 136, 141; 69 NW2d 171 (1955). Judicial admissions are procedural devices that streamline the proofs, while evidentiary admissions are, simply put, evidence. This Supreme Court explained this in *Radtke v Miller Canfield*, 453 Mich 413, 419-420; 551 NW2d 698 (1996) as it compared and contrasted judicial admissions under MCR 2.312 (requests to admit) with evidentiary admissions under MRE 801(d)(2).

Wayne Steel has argued, and the Court of Appeals accepted, that Agueros' in-court admission was somehow tainted or unreliable because his admission allegedly contradicted his deposition testimony. In support, Wayne Steel relied on such cases as *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). As set forth in the statement of facts, Agueros' in-court candid admission of comparative fault was entirely consistent with facts he testified to during his deposition. Agueros merely conceded a point that is the legal conclusion of the assorted careless acts he recounted during his deposition.

As for the Court of Appeals' panel's willingness to ascribe improper motives to Agueros' admission ("it was motivated by [Agueros'] desire to reach a settlement") the panel had no authority to engage in such fact-finding.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Wayne Steel, who declined to accept Lanzo's tender of its defense under the indemnity agreement and who declined to participate in the settlement with Agueros, convinced the lower courts that Agueros' in-court admission ought to be ignored. Its argument is akin to that of an insurance company who, having refused to defend its insured, then complains (when coverage is found) that the insured ought to have done a better job of defending itself. Such an argument falls on deaf judicial ears in the insurance context, where an insurer is bound by any reasonable settlement between its insured and a third party, *Detroit Edison v Michigan Mutual*, 102 Mich App 136, 144; 301 NW2d 832 (1980); *Elliot v Casualty Ass'n of America,* 254 Mich 282, 287; 236 NW 782 (1931) See also, *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989) [insurers waive their reliance on "take no action" clauses when they deny defense and insured settles with injured party]. It should be no different for the indemnity defendant who refuses to defend.

Indemnity law and insurance law intersect at many points, see, e.g., the application of insurance contract principles to indemnity contracts in *Eller v Metro Industrial Contracting*, 261 Mich App 569, 572; 683 NW2d 242 (2004) [applying "other insurance" priorities analysis to indemnifying parties at the same tier]. When an indemnitor disregards its contract, it should not be heard to complain about the way its indemnitee conducted the underlying litigation. Agueros' admission of comparative fault should have controlled on any question about the existence of an also-negligent party.

Allowing the Agueros' in-court admission of comparative fault to create the additionally-negligent party as a matter of law is no offense to preclusion principles.

Wayne Steel argued below that principles of collateral estoppel (and res judicata) should prevent its indemnity fate from being sealed by Agueros' admission of comparative fault. Not so. As shown above, indemnitors violate their contracted-for defense obligations at their own peril. The "potential" liability rules apply, including *Grand Trunk's* holding that

plenary trials on liability issues are not part of what is left-over after an underlying injury case settles. Agueros made a judicial admission of liability on the record in connection with his settlement. The underlying case should stand as it was litigated.

Because the Court of Appeals' panel chose to decide that Agueros was not to be believed when he swore under oath, in court, and admitted his negligence, the panel did not reach Wayne Steel's collateral estoppel argument. Wayne Steel argued the admission could not create what it admitted (a non-Lanzo negligent party) because to do so would violate principles of collateral estoppel.

Collateral estoppel is a far more flexible doctrine than Wayne Steel suggested in the lower courts. Its issue-preclusive effect extends to statements made as part of settlements. See, e.g., *Alterman v Provisor*, 195 Mich App 422, 427; 491 NW2d 868 (1992) (client precluded from suing lawyer based on statements made while a settlement was placed on the record though lawyer was not a party to the underlying case, "even though the parties are not identical, no mutual exists and no traditional exceptions apply"). In *Monat v State Farm Ins Co*, 469 Mich 679, 691; 677 NW2d 843 (2004), this Court accepted defensive use of collateral estoppel in the absence of mutuality. Lanzo was forced to defend itself against a claim of its "sole negligence." Citing numerous Michigan and out-of-state cases, the *Monat* Court held:

> [W]e believe that the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit.

Wayne Steel had a "full and fair opportunity" to litigate the underlying case. It just decided to refuse to honor its contract. Even in *American Mutual v Michigan Mutual*, 64 Mich App 315, 327, n 13; 235 NW2d 769 (1970), the case principally relied upon by Wayne Steel in the lower courts for its collateral estoppel analysis, the panel accepted that parties are completely free to agree that settlements they enter into bind them on particular issues of fact:

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

> It goes without saying that if the parties intend that the settlement is to bind them on certain issues of fact, and if this intention is reflected in the consent judgment, collateral estoppel will apply.

The present case is not about issue preclusion in the traditional sense, because the question about Wayne Steel's ability to challenge the Agueros admission arises in the indemnity contract context where the specialized rules of *Grand Trunk* and *Ford* apply. But if collateral estoppel is deemed part of the analysis, the flexibility of the doctrine is not offended. Wayne Steel had a full and fair opportunity to defend Lanzo. Agueros' sworn testimony makes clear the parties' intent to be bound by the comparative fault admission. Wayne Steel should not be permitted, after the fact, to challenge the way Lanzo defended itself given that it refused Lanzo's tender of defense.

Summary

By rights, Lanzo was entitled to grant of summary disposition in its favor. Wayne Steel cannot mount an effective defense to indemnity based on the sole negligence exception because: (1) Wayne Steel received notice of the suit but declined to defend or participate, so that all Lanzo needs to show is its "potential" liability to Argueros and Wayne Steel raised no fact issue on that, (2) *Grand Trunk*'s burden-shifting analysis and its analysis of the interaction between concepts of sole negligence and post-settlement indemnity obligations create insurmountable burdens for Wayne Steel on these facts, and (3) even if "sole negligence" remains a completely viable defense for Wayne Steel, post-settlement, as a matter of law it cannot be activated here because Agueros' status as an also-negligent party is sealed by his admission of comparative fault.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

RELIEF REQUESTED

Plaintiff/Appellant Lanzo Construction Company asks this Court to grant leave to appeal the decision of the Court of Appeals in this matter. Alternatively, plaintiff asks this Court to reverse the portion of Court of Appeals' decision that grants summary disposition in favor of Defendant/Appellee Wayne Steel Erectors and remand this case to the trial court for a trial on the merits.

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

By: Noreen L Slank

NOREEN L. SLANK (P31964)
Attorney for Plaintiff-Appellant
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

Dated: April 20, 2006
F:\FILES\05\058460\SPC ALA